

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

-----  
IN RE:

RESERVE CAPITAL CORP.

CASE NO. 03-60071

Chapter 11 Jointly Administred

Debtor  
-----

IN RE:

HAWKINS DEVELOPMENT LLC

CASE NO. 03-60072

Debtor  
-----

IN RE:

JAMES W. & LORI JO HAWKINS

CASE NO. 03-60073

Debtor  
-----

IN RE:

HAWKINS FAMILY, LLC

CASE NO. 03-60074

Debtor  
-----

IN RE:

HAWKINS MANUFACTURED HOUSING, INC. CASE NO. 03-60075

Debtor  
-----

IN RE:

FOREST VIEW, LLC

CASE NO. 03-60076

Debtor  
-----

IN RE:

WOODED ESTATES, LLC

CASE NO. 03-60077

Debtor  
-----

IN RE:

Debtor

-----  
APPEARANCES:

LEMERY GREISLER LLC  
Attorneys for § 1104 Trustee  
50 Beaver Street  
Albany, New York 12207

PAUL A. LEVINE, ESQ.  
§ 1104 Trustee

CRAIG R. FRITZSCH, ESQ.  
Attorney for Jointly Administered Debtors  
34 Chenango Street., Suite 401  
Binghamton, New York 13901

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

Presently under consideration by the Court is a motion filed on March 22, 2006, by Paul A. Levine, chapter 11 trustee ("Trustee"), seeking to substantively consolidate the chapter 11 cases of Reserve Capital Corp., Hawkins Development LLC, James W. and Lori Jo Hawkins, Hawkins Family, LLC, Hawkins Manufactured Housing, Inc., Forest View, LLC and Wooded Estates, LLC, which are currently being jointly administered (collectively, the "Debtors"). Opposition to the motion was filed by James W. Hawkins ("Hawkins"), as an individual debtor and equity shareholder on April 19, 2006.

The motion was originally scheduled to be heard on April 25, 2006, in Utica, New York, but was adjourned several times.<sup>1</sup> Ultimately, oral argument was heard by the Court on January

---

<sup>1</sup> The parties requested adjournment of the motion pending a ruling by the U.S. District Court for the Northern District of New York ("District Court") on an appeal filed by the Debtors, including Tioga Park, LLC, whose plan was previously confirmed by the Court and who,

20, 2007. At that time, the Court indicated that it would take the matter under submission once the District Court had rendered its decision on the Debtors' appeal of this Court's Memorandum-Decision and Order of March 7, 2005 ("March 2005 Decision").

On January 30, 2007, the Hon. Lawrence E. Kahn, U.S. District Court Judge for the Northern District of New York, issued his decision ("Judge Kahn's Decision"), affirming in part the March 2005 Decision and remanding a portion of the matter for further consideration by this Court. Accordingly, the motion of the Trustee, presently under consideration, was deemed submitted as of January 30, 2007.

### **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A) and (O).

### **FACTS**

James W. and Lori Jo Hawkins are individual husband and wife and the principals of the other jointly administered debtors. (Docket Nos. 190 and 221).<sup>2</sup> Reserve Capital was formed in 1992 by the individual debtors to be the financing arm of their mobile home sales and real estate

---

although a related debtor, is not the subject of the Trustee's motion.

<sup>2</sup> The information concerning the various debtors is derived from representations made in their disclosure statements and is simply provided as background without any specific finding by the Court of the truth of the matters asserted.

development businesses until sometime in 2000 when allegedly it was no longer able to obtain credit. (Docket Nos. 194 and 216). Hawkins Development, LLC was organized in 1996 as a real estate holding, developing and operating company. The company held and operated various parcels of real estate and was the development arm of the individual debtors for their numerous other entities. (Docket Nos. 196 and 219). Hawkins Family, LLC. was organized in 1996 to hold title to the residence of the individual debtors, as well as other real estate. (Docket No. 223). Hawkins Manufactured Housing, Inc. was formed in 1981 and served as the sales arm for mobile and modular homes until the alleged loss of financing and floor plan lines of credit from lenders. (Docket Nos. 200 and 225). Wooded Estates, LLC was organized in 1996 for the purpose of owning and operating the Wooded Estates Mobile Home community, a property of some 76 rental units located in Harpursville, Broome County, New York. (Docket Nos. 202 and 229). Forest View, LLC was also organized in 1996 as a single asset real estate company to hold and operate a 32 unit mobile home community located on Brown Road, Town of Windsor, Broome County, New York. (Docket Nos. 204 and 227). At the time of filing, Tioga Park, LLC owned and operated a partially developed race track located in the Town of Nichols, Tioga County, New York, acquired in 1996, which at the time of filing had been leased out for a variety of public and private events. (Docket Nos. 192).

On or about December 23, 1997, Binghamton Savings Bank & Trust Company (“BSB”) extended credit to Reserve Capital and James W. and Lori Jo Hawkins as “borrowers” as set forth in the Mortgage Consolidation Agreement dated December 23, 1997 (“Consolidation Agreement”). *See* Trustee’s Exhibit J. Wooded Estates, LLC, The Hawkins Family, LLC, Forest View, LLC and Hawkins Development Co. LLC, were each identified as “mortgagor” in the

Consolidation Agreement. *Id.* Indeed, James W. Hawkins signed the Consolidation Agreement on behalf of the various mortgagors. *Id.* The Consolidation Agreement also provides a guarantee of repayment of a promissory note (Note”), also dated December 23, 1997, by Hawkins’ Manufactured Housing, Inc., as well as James W. Hawkins and Lori Jo Hawkins. *Id.*

On November 20, 2002, the Hon. Walter J. Relihan, Jr. of the New York State Supreme Court, Broome County, entered a Judgment of Foreclosure and Sale in favor of BSB Bank & Trust Company, n/k/a Partners Trust Bank, in the amount of \$4,405,227.54, together with interest from August 12, 2002, against various entities, including the Debtors. The Debtors, including Tioga Park LLC, filed voluntary chapter 11 petitions on January 7, 2003.

On June 1, 2004, this Court confirmed the chapter 11 plan of Tioga Park, LLC. On September 6, 2004, the Trustee was appointed to administer all of the cases.<sup>3</sup> On October 29, 2004, the Court signed an Order approving the sale of substantially all of the real property belonging to the Debtors, as provided for in a memorandum agreement incorporated in the Order confirming the plan of Tioga Park, LLC. The March 2005 Decision authorized the Trustee to enter into a settlement, which, *inter alia*, included a provision that the \$2.4 million in net proceeds from the auction of the Debtors’ real property be turned over to Asolare II, LLC, the ultimate assignee of the secured claims once held by BSB Bank & Trust Company.

The motion now under consideration seeks to substantively consolidate all of the cases, with the exception of Tioga Park, LLC. In support of his motion, the Trustee provides a summary of the proofs of claim filed in the cases. *See* Exhibit H of the Trustee’s motion. BSB

---

<sup>3</sup> Judge Kahn’s Decision affirmed this Court’s appointment of the Trustee postconfirmation in the Tioga Park, LLC case.

Bank filed proofs of claim in all of the cases on March 3, 2003, in the amount of \$6,563,349. However, the Court notes that said filings were prior to the agreement between BSB and Asolare Corporation, dated September 24, 2003, assigning the secured portion of its claims to Asolare Corporation, which in turn sold and assigned its rights to those claims to Asolare II, LLC on October 30, 2003. Indeed, the Trustee's summary of the proofs of claim also lists the proofs of claim filed by Asolare II, LLC on March 10, 2004, in the amount of \$7,330,956.60 in the cases of Reserve Capital, James W. and Lori Jo Hawkins and Hawkins Manufactured Housing and in the amount of \$4,620,985.44 in the case of Wooded Estates. However, on September 7, 2004, Asolare II, LLC amended its proofs of claim to reflect a claim of \$4,845,221.64 in the cases of Reserve Capital, James W. and Lori Jo Hawkins and Hawkins Manufactured Housing and adding a claim in the amount of \$4,620,985.44 in the cases of Hawkins Family LLC and Forest View LLC. It also filed a proof of claim against Hawkins Development in the amount of \$4,845,221.64. Hinman, Howard and Kattell filed proofs of claim in all of the cases in amounts ranging from \$646.40 to \$24,684 for attorney's fees rendered on behalf of those entities. Proofs of claim were also filed by James and Dan View in the amount of \$20,621.39 in the cases of Reserve Capital, James W. and Lori Jo Hawkins and Hawkins Manufactured Housing. In addition, the New York State Department of Taxation & Finance filed proofs of claim in the cases of Reserve Capital, James W. and Lori Jo Hawkins, Hawkins Family Trust and Hawkins Manufactured Housing, some of which are in excess of \$80,000. There are also several creditors that have filed proofs of claim in the case of Reserve Capital and several other creditors filed proofs of claim in that of James W. and Lori Jo Hawkins, which have no commonality with each other and vary in their amounts. The most substantial claim in this category is the claim of

Kirkpatrick & Lockhart LLP in the amount of \$509,115.13 in the case of Reserve Capital.

### **ARGUMENTS**

The Trustee asserts that the financial affairs of the Debtors are “confused and overlapping” and there is a “substantial identity of creditors” in raw dollar amount. He points out that BSB Bank treated the Debtors as jointly and severally liable on millions of dollars in debt that overwhelms all other claims. In addition, while acknowledging that attempting to untangle the affairs of the Debtors will not be impossible, the Trustee asserts that it would require significant legal and forensic accounting work, which will never be entirely accurate. He points out the added administrative expense that will be incurred in connection with having to file several different plans and disclosure statements. He also cites to the need for additional claims objections in the event that his motion is denied, which may result in additional delay in case administration and ultimate distribution to creditors.

Hawkins, as an individual debtor and equity shareholder,<sup>4</sup> takes exception to the Trustee’s contention that there is a substantial identity of creditors among the Debtors. He asserts that the

---

<sup>4</sup> At the hearing on January 30, 2007, the Trustee asserted that Hawkins, as a debtor and equity holder, lacked standing to oppose the Trustee’s motion to substantively consolidate the cases. Whether Hawkins has standing depends on whether he has a personal stake in the outcome of the controversy and will suffer actual injury if the relief sought is granted. *See In re Balanced Plan, Inc.*, 257 B.R. 921, 923 (Bankr. W.D.Mo. 2001). The Court has serious reservations concerning Hawkins’ standing to oppose the Trustee’s motion. However, it believes it unnecessary to consider the assertions made by Hawkins given the Court’s independent obligation to examine the Trustee’s motion, which is based on the Court’s equitable powers pursuant to § 105(a) of the U.S. Bankruptcy Code, 11 U.S.C. § 101-1330 (“Code”), rather than on any other specific statutory authority.

only obligation to BSB/Asolare II, LLC of Hawkins Development, Hawkins Family, LLC, Forest View and Wooded Estates, as “mortgagor,” was the pledge of their real estate assets. Hawkins also asserts that “Hawkins Development stands to collect a substantial amount of money from the action commenced against Sidney Federal Credit Union and The Hospital of Sidney, New York, which he contends are not liened to either BSB or its assignees.”<sup>5</sup> Hawkins also contends that monies he paid in “adequate protection” to Hawkins Family, LLC are not committed to BSB Bank or its assignees. He also asserts that both Forest View and Wooded Estates have assets which are not committed to BSB Bank or its assignees. He makes the argument that “BSB clearly never looked to the LLCs of Hawkins for guarantees of anything and they were not seen as a single entity in the eyes of the lender.”

## **DISCUSSION**

### **Impact of Judge Kahn’s Decision**

As noted previously, the parties requested several adjournments of the Trustee’s motion for substantive consolidation of the cases in anticipation of a ruling by the District Court on the Debtors’ appeal of this Court’s March 2005 Decision. The Debtors argued that if this Court’s denial of their motion to disallow the secured claim of Asolare II, LLC in excess of \$4.8 million was reversed, it would have a significant impact on the distribution of assets to the creditors in

---

<sup>5</sup> The Court notes that an adversary proceeding was commenced against the Sidney Federal Credit Union and The Hospital of Sidney, New York, in 2005 to recover rent of \$12,430 and \$7,426.50, respectively (Adv. Pro. 05-80274). By Order, dated August 7, 2006, the Court approved a settlement by the Trustee of the adversary proceeding whereby Sidney Federal Credit Union agreed to pay \$2,000 and The Hospital of Sidney, New York agreed to pay \$7,426.50.



the various cases in which it had filed proofs of claim. That argument, however, is without merit given the fact that the District Court affirmed this Court's ruling on that issue in Judge Kahn's Decision of January 30, 2007.

### Substantive Consolidation

"The sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors." *Union Savings Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.)*, 860 F.2d 515, 518 (2d Cir. 1988). If the Court were to grant the Trustee's motion, the assets of the Debtors would be pooled together into a single common fund from which the claims against all the Debtors would be satisfied. *Id.* Intercompany claims would be eliminated, and a single plan would be submitted for consideration by all of the creditors. *Id.*; *see also Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.)*, 402 F.3d 416, 423 (3d Cir. 2005) (stating that "substantive consolidation treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor.").

The substantive consolidation of bankruptcy cases is to be applied sparingly "[b]ecause its effect radically rearranges legal boundaries, assets and liabilities . . . ." *Id.* It is appropriate for use in situations where "the debtors' assets are so scrambled that unscrambling them is cost, time and energy prohibitive or creditors already perceive the debtors as simply a single unit and deal with them so." *Id.* In *Augie/Restivo* the U.S. Court of Appeals for the Second Circuit held that in considering whether to allow substantive consolidation, a court is to focus on two critical

factors: “(i) whether creditors dealt with the entities as a single economic unit and ‘did not rely on their separate identity in extending credit,’ . . . or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors.” *Augie/Restivo*, 860 F.2d at 518. The proponent need not satisfy both factors; rather, the factors are alternative means of procuring substantive consolidation. *See In re Owens Corning*, 419 F.3d 195, 212 (3d Cir. 2005), *cert. denied sub nom., McMonagle v. Credit Suisse First Boston*, 126 S.Ct. 1910 (2006).

In considering the first factor, it is essential that the Court be able to ensure that creditors obtain the benefit of their bargain. A creditor with a claim against an asset-rich debtor enterprise should not have recovery substantially reduced when those assets are pooled with those of an asset-poor debtor enterprise. Keeping in mind the concern that all creditors receive equitable treatment of their claims, there simply is not sufficient evidence to support the Trustee’s motion. There is no suggestion that the Debtors disregarded corporate formalities which created “contractual expectations of creditors that they were dealing with the debtors as one undistinguishable entity.” *Owens Corning*, 419 F.3d at 212.

For example, BSB, whose secured claim has been assigned to Asolare II, LLC, extended credit to Reserve Capital and James W. and Lori Jo Hawkins as “borrowers” as set forth in the Mortgage Consolidation Agreement dated December 23, 1997 (“Consolidation Agreement”). *See* Trustee’s Exhibit J. At the same time, it recognized the interests held by not only James W. and Lori Jo Hawkins but also by Wooded Estates, LLC, The Hawkins Family, LLC, Forest View, LLC and Hawkins Development Co. LLC, all of which are identified as “mortgagor” in the Consolidation Agreement. *Id.* Indeed, James W. Hawkins signed the Consolidation Agreement on behalf of the various mortgagors. *Id.* The Consolidation Agreement also provides a guarantee

of repayment of the Note by Hawkins Manufactured Housing, Inc., as well as James W. Hawkins and Lori Jo Hawkins. *Id.* It is evident that BSB relied on the Debtors' separate identities in extending credit. Indeed, it, along with Asolare II, LLC, filed proofs of claim in all of the Debtors' cases.

Wilber National Bank also extended credit to Reserve Capital and received a mortgage on real property in September 1997. It filed a proof of claim (Claim No. 3) on February 6, 2003, a month after the Debtors filed their petitions, in the amount of \$25,615.14. A review of the documents attached to the proof of claim indicates that it dealt with only one entity in connection with the transfer, namely Reserve Capital, and relied on at least a single parcel of real property deeded to Reserve Capital in April 1997, as collateral for its loan.<sup>6</sup> There is no indication that Wilber believed that it was transacting business with any other entity than Reserve Capital. Indeed, it filed its proof of claim only in the case of Reserve Capital.

The fact that the Debtors may have employed the same law firm and/or accountant, as asserted by the Trustee, does not provide a rationale for consolidating the cases. Nor does the assertion that the income and expenses of the limited liability companies, for taxation purposes, appeared on the individual debtors' joint tax return serve as a basis for substantive consolidation under the first factor set forth in *Augie/Restivo*.

The question then is whether the second factor warrants the relief sought by the Trustee. In this regard, the Trustee contends that the financial affairs of the Debtors are "confused and overlapping" and there is a "substantial identity of creditors" in raw dollar amount. He

---

<sup>6</sup> Attached to Wilber National Bank's proof of claim is a copy of an unexecuted Assignment of Mortgage, dated October 25, 1996, purporting to assign a mortgage, dated October 25, 1996 in which Reserve Capital is designated as mortgagor, to Wilber National Bank.

acknowledges, however, that untangling the affairs of the Debtors, while it may require extensive legal and forensic accounting work, is not impossible. There have already been several different plans and disclosure statements filed on behalf of the various Debtors. While he has expressed concerns about the additional delay in case administration and ultimate distribution to creditors that may result in the event that substantive consolidation is denied, that is not sufficient to warrant substantive consolidation of the cases. *See Owens Corning*, 419 F.3d at 211 (noting that in analyzing the factors one must be mindful that “[m]ere benefit to the administration of the case (for example, allowing a court to simplify a case by avoiding other issues or to make postpetition accounting more convenient) is hardly a harm calling substantive consolidation into play.”).

Based on the foregoing, it is hereby

ORDERED that the Trustee’s motion seeking substantive consolidation of the Debtors’ cases is denied.

Dated at Utica, New York

this 21st day of March 2007

---

STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge